IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 39 OF 2005

Stefano Mora,
presently lodged in
Central Jail Aguada,
Sinquerim, Bardez,
Goa. ... Appellant

versus

State of Goa,
as represented by
Officer-in-charge
Anjuna Police Station
Bardez, Goa. ... Respondent

Mr. J. P. D'Souza with Ms. Caroline Collasso, Advocates for the Appellant.

Mr. C. A. Ferreira, Public Prosecutor for the Respondent.

CORAM : N. A. BRITTO, J.

DATE : 3rd/4th MAY, 2007.

ORAL JUDGMENT

This appeal is filed by the accused who has been convicted and sentenced under Section 20(b)(ii)(C) of the Narcotics Drugs and Psychotropic Substances Act, 1985, by the learned Special Judge of the N.D.P.S. Court at Mapusa by Order dated 21-7-2005.

2. The accused was charged and tried with an allegation that on 12-12-2002 he was found with 22 gms. of charas on his person and 1.8 kgs. of charas in a foam mattress which was under the bed in the room occupied by him and owned by Mahadev Phadte. According to the prosecution the raid was conducted pursuant to prior information received and recorded that the accused was dealing in charas in the said room.

3. The prosecution examined 10 witnesses to support the charge.

4. The case of the accused was that he never resided in the house of Mahadev Phadte but he was residing in a room of an old lady whose name he did not know and he was arrested therefrom. According to him, the C-form produced by the prosecution was created subsequent to his arrest when he was made to sign various documents by force at Anjuna Police Station and that no drugs were found either on his person or in his presence. The accused did not examine any witness.

5. As per the case set out by the Investigating Police Inspector Shri Wilson D'Souza/PW 4, on 12-12-2002 he was attached to Anjuna Police Station when he received a telephonic message at about 12.30 hours that an Italian National was residing in a center room of three rooms belonging to Mahadev Phadte at Bondirvaddo, Chapora and was dealing in drugs, and, he reduced the said information in writing and sent a copy of the same to Sub-Divisional Police Officer Shri Allen De Sa/PW6 with special messenger and thereafter at about

12.50 hours he secured the presence of two panchas, namely Ramesh Naik/PW3 and one Auchut/CW2 and explained to them about the receipt of the reliable information and introduced them to the members of the raiding party and left the Police Station at about 13.15 hours along with the kit box and the seal of the Anjuna Police Station and Dy. S. P. De Sa/PW6 followed them and they reached at the spot at about 13.25 hours and then he sent Constable Gaonkar to confirm whether the said foreigner was available in the said room and after the said fact was confirmed they proceeded on foot and found the main wooden door latched from inside. There was a metal plate fixed on the door frame having the inscription of Village Panchayat House No. 19 and upon knocking on the door of the said room the foreigner opened the door and he introduced the members of the raiding party to the accused and informed him about the information and his desire to conduct his personal search and also of the said room, for drugs. He also told the accused that he had a right to be searched by a Gazetted Officer or a Magistrate of his choice but the accused declined the offer and thereupon he took personal search of the accused and found on the right pant pocket two pieces of blackish colour substances, suspected to be charas and which when weighed along with wrappers were found to be 22 gms. and which he put in a polythene bag, heat sealed and then put in an envelope, packed and sealed the same with 8 seals of Anjuna Police Station, and the relevant details were written on the envelope, signed by him, the two panchas and the accused.

6. P.I. Wilson/PW 4 further stated that nothing was found in the left

hand side pant pocket of the accused but under the bed there was a mattress i.e. synthetic type foam which was rolled and tied with a ribbon and when unrolled and untied it was found to contain many pieces of black colour substances in different shapes and sizes wrapped individually in greenish bluish and transparent cellophane paper and sealed with thin adhesive tape all over the foam sheet and the said substance was suspected to be charas and when weighed with individual wrappings was found to be 1.80 kgs. which thereafter was put in transparent polythene bag, heat sealed, then put in an envelope, duly packed and sealed with 8 seals of Anjuna Police Station and after writing the relevant details it was signed by him, the panchas and the accused. According to him, there was also a blue colour pollo bag found in the corner of the said room in which there was cash of Rs.460/- in different denominations and also a passport bearing No.932735Z which was also attached. According to him, the letter dated 12-12-2002-Exh.9-addressed to DFDA(Director of Food and Drugs Administration) was prepared at the spot and the letter dated 12-12-2002-Exh.30-addressed to Writer Head Constable Shetgaonkar/PW7 was also prepared on the spot. According to him, Writer Head Constable Shetgaonkar/PW7 was called by him to the spot and the said letter Exh.30 with other seized articles including Exh.1(22 gms. of charas) and Exh.3 (1.8 kgs. of charas) were handed over by him to Shetgaonkar at the spot. As stated by him, on the same day, Mahableshwar/PW5, the son of the owner of the said three rooms came to the Police Station along with C-form which Mahableshwar/PW5 had submitted to Anjuna Police Station upon the arrival of the accused on 9-12-2002.

7. Broadly stated, there are three contentions raised on behalf of the accused. Firstly, it is submitted that it is doubtful that the seizure and sealing of the articles was done at the spot as claimed by the prosecution, particularly Exh.1(22 gms. of charas) and Exh. 3(1.8 kgs. of charas). Secondly, the story that the seized articles were handed over to Shetgaonkar/PW7 at the spot is a false story and thirdly, prosecution has failed to prove that the room was in the occupation of the accused.

8. I will deal first with the second grievance of the accused i.e. the safe custody of the seized articles, after the seizure and thereafter. There is no dispute raised that the seized articles, namely Exh.1 and Exh.3 were analyzed in the Laboratory by the Junior Scientific Officer Shri Kaissare/PW1 on 13-12-2002 and found to contain charas. The said articles namely Exh.1 and Exh. 3 as per the evidence of Scientific Assistant Shri Naik/PW2 and Shetgaonkar/PW7, were sent by the latter upon instructions of Wilson/PW4 to the former on 12/12/02 and Naik/PW2 sent them to the DFDA on 13-12-2002 but the question is whether the version of P.I. Wilson/PW4 that they were given in the custody of Shetgaonkar/PW7 at the spot, after they were seized and sealed could at all be accepted?

9. The learned Special Judge has rightly doubted the presence of Shetgaonkar at the spot and consequently that the seized articles were handed over to him by P.I. Wilson/PW4 at the spot. This can be seen from para 29 of the Judgment. The version of Wilson/PW4 that he called Writer Constable

Shetgaonkar to the spot and handed over the seized articles there and particularly Exh.1 and Exh.3 is not free from doubt and so also that letter Exh.30 was prepared at the spot which is a letter handing over the said articles to Shetgaonkar/PW7.

10. As per Wilson/PW4 he prepared the said letter-Exh.30 on the spot which according to him was typed by one of the members of the raiding party but not by Shetgaonkar/PW7 after he called him to the spot. Shetgaonkar was examined as PW7 who in his entire examination-in-chief did not whisper a word of he being called to the spot by Wilson/PW4. Only on being alerted by the defence in cross-examination when he was asked whether seized articles were handed over to him, in the cabin of Wilson/PW4 or in the room where he sits that he answered stating that they were handed over to him after he was called to the spot at Bondirvaddo, Chapora. If Shetgaonkar/PW7 chose to remain silent in his examination-in-chief about his being called to the spot by Wilson/PW4 so did Dy.S.P. D'Sa/PW6 who did not at all refer to Shetgaonkar/PW7 being called to the spot in order to hand over the said articles. On the contrary, the panch witness Ramesh Naik/PW3 has made a categorical statement that no outsider had come near the said room at the time of the said raid or during the entire process of search and seizure. He further stated that all the members of the raiding party had remained in the room throughout except the driver of the vehicle who had not come in the room. In other words, the panch witness Ramesh Naik/PW3 falsifies the version given by Wilson/PW4 and Shetgaonkar/PW7 that the former called the latter to the room and the latter

having gone to the room where the seized articles were handed over to him. Moreover, the very records produced by the prosecution also falsify the claim of Wilson/PW4 and Shetgaonkar/PW7 that the latter was present in the said room to take over the custody of the seized articles. Shetgaonkar/PW7 after stating that he was called to the spot and handed over the seized articles, admitted that there was no record in the station diary that Wilson/PW4 had called him on the spot of the raid and that he had come to the spot and collected the seized articles, etc. On further cross-examination he admitted that he had left the Police Station at 16.10 hours for Motor Vehicle checking and in fact the station diary-Exh.45 colly. shows that he had proceeded at 16.10 hours for Motor Vehicle checking. In other words the station diary-Exh.45 colly shows that until 16.10 hours he was very much at the Police Station and could not have been at the spot to receive the seized articles from Wilson/PW4 at the close of the panchnama at 16.00 hrs. or before the raiding party left the spot at about 16.05 hrs. As per the very case of the prosecution, the raiding party had returned at the Police Station at 16.15 hours and then the FIR was recorded. On further cross-examination, Shetgaonkar/PW7 stated that he had returned from his duty as Motor Vehicle checking within 5 to 10 minutes but there was no entry made regarding his return on the station diary. Again, if Shetgaonkar/PW7 had returned within 5 to 10 minutes, after having gone for Motor Vehicle checking at 16.10 hours obviously he could not have returned prior to 16.20 hours or so by which time the raiding party was already at the Police Station. The very fact that there is no return entry made by Shetgaonkar/PW7 it is doubtful whether he at all returned at the Police Station as claimed by him. In the light of the

versions given by Ramesh Naik/PW3 and Dy. S. P./PW6 and the station diary produced, the versions of Wilson/PW4 or for that matter Shetgaonkar/PW7 that the former had given to the latter the seized articles after preparing Exh.30 on the spot could not have been accepted. It is therefore obvious that this was part of the case of the prosecution which was not free from doubt and as such no reliance could have been placed on the same. It may also be noted that on the very face of Exh.30 it can be seen that it carries the address of Anjuna Police Station and makes no reference whatsoever that it was typed at the spot and therefore it also can be presumed that it was prepared at the Police Station. This Court in ***Gopal Bahadur V/s. State of Goa (unreported decision dated 6/10/05 in Criminal Appeal No. 43 of 2004)*** has stated that;

> "The Courts have always frowned upon with the practice of Police Officers keeping the custody of the seal as well as of the seized articles for long in the hands of the same Officer. In other words, a person who has the custody of the seized articles and the seal used to seal the same, should not continue to have both for long because such practices can lead to tampering with the seized article. The Act has taken special care that in normal course after the seizure, the seized drug should be handed over in the custody of the Officer in charge of the nearest Police Station. No such provision is made in case of seal."

> "When the sentence provided is severe, the procedures followed should be beyond suspicion and above board. The Officer having the custody of the seized article and the custody of the seals, should not be the same. All these procedures are required to be followed in order to avoid the possibility of tampering with the sample and to lend assurance to the Court that in a given case there was no such tampering."

This part of the story of the prosecution that the seized articles were handed over by Wilson/PW4 to Shetgaonkar/PW7 at the spot could not at

all been accepted, as both of them have proved themselves to be very unreliable.

11. The next controversy raised is as regards the sealing of the articles at the spot i.e. whether they were sealed at all at the spot. Related to this is also preparation of letter dated 12/12/02 Exh.9 addressed to D.F.D.A., which according to Wilson/PW4, was also prepared at the spot of seizure.

12. On the very face of the said letter exhibit 9, copy of which is at exhibit 28, shows that it was prepared at Anjuna Police Station, since there is otherwise nothing to indicate in the address typed that it was prepared at the spot. It is pointed out on behalf of the accused that the said letter could not have been prepared, as stated by Wilson/PW4 at the spot since it shows the crime no.91/2002 written on it of Anjuna Police Station and it also refers to the time at which the said crime was registered, being 16.15 hours. Learned Counsel on behalf of the accused therefore contends that the very fact that it shows the crime number and the time at which the crime was registered, is a very strong indication to show that it was prepared at Anjuna Police Station and not at the spot of seizure as otherwise falsely stated by Wilson/PW4. On behalf of the respondent, it is contended by the learned Public Prosecutor, that the said letter exhibit 9/28, was not required to be prepared at the spot and since it was not required to be prepared at the spot, the statement of Wilson/PW4 that it was prepared at the spot could be ignored. It may be that the said letter Exh.9 was not at all required to be prepared on the spot and could have been prepared

upon return to the Police Station. However, what is not stated on behalf of the respondent is that why Wilson/PW4 should have at all stated that the said letter was prepared at the spot when in fact it was prepared at the Police Station and if so, as to why he should not be disbelieved in respect of the other facts stated by him as well? As far as this aspect is concerned, the learned trial Court has come to the conclusion and, in my view rightly, that exhibit 9 was prepared at the Police Station and not at the spot. In this context, reference could be made to the evidence of DySP Shri D'Sa/PW6, wherein he has also tried to confirm what Wilson/PW4 had stated, by stating that, the letter exhibit 9, addressed to the D.F.D.A, was prepared at the spot. At the same time, DySP Shri D'Sa/PW6, admitted that the crime number is allotted as soon as an offence is registered at the Police Station and the very fact that the letter exhibit 9/28 shows the crime number as well as the time at which the crime was registered was more than sufficient to conclude that the said letter was prepared at the Police Station and it is, therefore, obvious that Wilson/PW4 as well as DySP Shri D'Sa/PW6, had falsely stated that the said letter was prepared at the spot. There is no whisper in the evidence of panch witness Ramesh/PW3 as to where this letter was prepared. Prosecution story appears to have been largely manipulated on this score. One fails to understand the reason why inspite of the said letter having been prepared at the Police Station, both Wilson/PW4 and DySP Shri D'Sa/PW6, ought to have categorically stated that the same was prepared at the spot. This Court in the case of ***Vikram Reddy v. State of Goa (2002 Bom. C.R. (Cri.) 499)***, observed thus:

> "If a cloud of suspicion hovers on preparation of letter of specimen seal impression, the mere tallying of seals by chemical analyser would not guarantee that samples had not been tampered with". "In the present case... the letter appears to have been prepared in Police Station subsequent to registration of offence." P.S.I. concerned has rendered himself as unreliable and untruthful witness. "It not only affects the credibility of Officers conducting the search but also affects the basic fabric of prosecution case...."

13. The same view was followed by this Court in ***Gopal Bahadur v. State of Goa***, (unreported decision dated 06.10.2005, in Criminal Appeal No. 43/2004) and could be followed in this case as well. The Apex Court was dealing with a similar matter in the case of ***State of Orissa v. Sitansu Sekhar Kanungo (JT 2002 (8) SC 292)***. In that case, the number of the FIR had appeared on the seizure list and Apex Court observed that the doubt which sprang as regards the seizure list admittedly could not be brushed aside. The Apex Court observed that the seizure lists ought to have been prepared before the lodgment of the FIR and as such question of mention of the FIR number in the seizure lists would not arise at all. But in the contextual facts, the indication of the case number in the seizure list has resulted in the submission of the learned Advocate for the defence before the High Court as also before that Court that this extra noting on the seizure lists could not but be ascribed to be a manipulation in the document which is not permissible under the law. The High Court though not placed much reliance apparently thereon, but obviously the

same had its due impact and effect on the Court since in the last paragraph, the High Court, did speak of "*other factors*" highlighted coupled with the non-production of *malkhana* register that have given fatality to the prosecution case. This observation of the High Court by itself connotes that the High Court has taken note of it with due particulars and it is on the issue of facts that the High Court felt that there would be justice trampled if an Order is passed in favour of the prosecution. If two responsible Officers in this case have stated that the letter exhibit 9 was prepared at the spot, when in fact, it was not as earlier demonstrated by the defence, there is no reason why, both these officers ought to be believed as far as the other procedures which are stated to have been followed by them. Added to this aspect, there is another controversy as regards the sealing in the manner and Order stated to have been done by Wilson/PW4 as well as the panch witness Shri Naik/PW3 as well as by DySP Shri D'Sa/PW6 and as recorded in the panchanama as well. According to the versions given by the aforesaid witnesses and as recorded in the panchanama, each of the exhibits were put in an envelope, duly packed and sealed with eight seals of Anjuna Police Station, after writing the relevant details and were signed by the panchas and by the accused and by Wilson/PW4, as the panchnama progressed. It may be noted that the Passport of the accused was the last item which was found and seized. Admittedly, all the seized articles carry number of passport the accused on the envelopes and it is the contention of the defence Counsel, that in case the passport was the last item to be found and the articles were seized and the details were written on the envelopes in sequence and prior to the finding of the passport, the number of the passport could not have found a

place on the description written on the said envelopes. A question in this regard was asked to Ramesh Naik/PW3, after PW3 had confirmed that the writings between points X and Y on exhibit 1 (22 grams of charas), Exhibit 3 (1.8 kgs of charas) and exhibit 4 (foam mattress), were done after each of the parcels were packed and sealed and before their signatures were taken. In fact, Ramesh Naik/PW3, was asked as to at what stage the said writing between points X and Y was written but the question was disallowed by the learned trial Court and it is the contention of the learned Counsel for the defence that by disallowing the said question, the accused has been prejudiced. Be that as it may, when Wilson/PW4 was questioned as regards the number of the passport being written between points X and Y, he stated that those details were written by Constable buckle no. 3746 upon his dictation. He was questioned by the Court as regards the details of the passport number, being found on the said exhibits and he stated “that probably the details of the recovery were written, after the recovery of the passport, and not earlier as stated by him.” In other words Wilson/PW 4 sought to convey that passport number was written only after the passport was found thereby raising a doubt whether what he had other witnesses had stated and the panchanama had recorded, was correctly recorded i.e. the details on each parcel were recorded as each parcel was sealed. The very fact that the passport number was found written on the description particularly of exhibit 1 and exhibit 3, before the passport was actually found, throws doubt whether they were at all sealed in the manner stated by the said witnesses and recorded in the panchanama. In other words, that sealing of the articles, particularly, Exh.1 and Exh.3 was done in a manner

claimed by the prosecution is a story which is not free from doubt.

14. To prove that the accused was in possession of the central room of house no.19 of Chapora of Mahadev Phadte, prosecution produced C-form and examined Mahableshwar Phadte/PW5 to support the same. Admittedly the C-form does not refer to any particular room of H. No. 19. Admittedly, also and as stated by Wilson/PW4, the accused was not given along with case papers the C-form nor the statement recorded of the said Phadte/PW5, which according to Wilson/PW4 was recorded on 12/12/02 and there is no explanation for such a lapse forthcoming from the prosecution. No application was also filed by the prosecution seeking leave to rely on the said “C” form. The carbon copy of the said C-form (hotel arrival report submitted under the Foreigner's Rules 1939) was first sought to be produced on 2/08/04 when Wilson/PW 4 was examined but was objected to by the defence and therefore was not exhibited. The learned Special Judge directed that the original/attested/certified copy should be produced; to prove its admissibility. However, when Phadte/PW5 was examined on 1/12/04 no effort was made by the prosecution to exhibit the same through him. It was the case of prosecution that the said carbon copy of C-form retained by Phadte/PW5 was handed over to Wilson/PW4 on the same day. Being so, the said carbon copy could have been exhibited and proved by the prosecution when the said Phadte/PW5 was examined. The learned defence counsel has relied on ***Vijender v. State of Delhi (1997 SCC(Cri.) 857)*** submitting that such course was not open to the prosecution. The prosecution, notwithstanding the order dated 2/08/04 directing the production of original, etc. ought to have made

an effort to get the carbon copy of C-form exhibited and proved through Phadte/PW5. It may be stated that a carbon copy is made by one uniform process within the meaning of explanation 2 to Section 62 of the Evidence Act. If any authority, to support such a proposition is required, then reference can be made to ***Prithi Chand v. State of H.P.(AIR 1989 SC 702)***. The facts of the case of ***Vijender v. State of Delhi*** (supra) are totally different. In that case the doctor who was otherwise available was not examined to support the post mortem examination report and what was produced was a carbon copy through a clerk and it is in this context that the Apex Court observed that under Section 64 of the Evidence Act, the document must be proved by primary evidence, i.e. by producing the document itself except in cases mentioned in Section 65 thereof. Since the copy of the post mortem report did not come within the purview of any of the clauses of Section 65 it was not admissible on this score also. It appears that whilst deciding ***Vijender v. State of Delhi*** (supra) the attention of the Hon'ble Apex Court was not invited to ***Prithi Chand v. State of H.P.*** (supra) nor to Section 62 of the Evidence Act. The next submission of the defence counsel is that by not producing the original, the accused has been prejudiced and in this context the learned counsel has placed reliance on a decision of this Court in ***State of Maharashtra v. Jagdish B. Shah (1992(1) Bom CR 405)*** wherein this court observed thus:

> 'The accused were charge-sheeted for having committed offences punishable under the Dangerous Drugs Act, 1930, which was the statute at that time in force, and were accordingly put on trial. For some strange reason, the prosecution dispensed with its primary duty of examining the person who had signed the Chemical Analyzer's Report and who ought to have proved its contents. Apparently, the prosecutions ought to take

shelter under the provisions of Section 293 of the Code of Criminal Procedure, 1973 and to tender this document through the Investigating Officer. It has been pointed out to me that the learned Defence Counsel objected to the admissibility of the report which objection has been noted by the learned Magistrate. Why a ruling was not given on the objection is not known, and I need to record that this is a highly unsatisfactory state of affairs whereby the validity of that document was kept in suspended animation. This is important, to my mind, because after noting the objection, the learned Magistrate took the document on record and it has, in fact, been marked as an Exhibit. If one were to assume that the objection was overruled, the learned Magistrate ought to have indicated it at that point of time because the future course of the trial could have been very different. It would have been open to the accused to challenge that order if they were so advised, or it could have been open to them to insist on the production of the witnesses, but the type of noting made by the learned Magistrate could have reasonably created an impression in the mind of the learned Defence Counsel that the matter was still very much open and that, consequently, there was no reason for the defense to take any further steps.'

'I have referred to this aspect of the matter because Mr. Ganatra, learned Counsel appearing on behalf of the respondent-accused, has very seriously attacked the admissibility of this document and on reliance being placed on it by the Court, and to my mind, with considerable justification. The learned A.P.P. has sought to overcome the hurdle by contending that in so far as the defense did not take any steps after merely having recorded the objection, the Court must conclude that virtually the document has come on record by consent. If that is so, then the objection, if any, or the rights which are now being canvassed are deemed to have been waived. Unfortunately, this argument has been fully replied to by Mr. Ganatra, who has very rightly pointed out that where the law specifically prohibits a particular procedure in the course of a trial even in cases where no objection is raised or consent is wrongly recorded that procedure cannot take on the garb of legality. This, in fact, is the correct position in law and, therefore, the defense of the learned A.P.P. to my mind is of no avail.'

15. In my view, there is no question of any prejudice having been caused to the accused in this case because the very author of the 'C' form of which copy was produced was extensively cross-examined by the defence.

However, the controversy does not end there. As per Wilson/PW4 and Phadte/PW5 the carbon copy of C-form was given to Wilson/PW4 on 12/12/02. A statement to that effect was made by Wilson/PW4 on 6/05/04 and by Phadte/PW5 on 19/11/04. However, Wilson/PW4 on 25/08/04 contradicted himself and stated that on 12/12/02 he had asked the mother of the owner for C-form and she had produced the same and conceded that he had made no reference to it in his complaint. Dy.S.P. D'Sa/PW6 also stated that Mrs. Phadte was called with C-form and she produced the same before Wilson/PW4. This could only be at the place of raid and not at Police Station. Wilson/PW4 and D'Sa/PW6 have falsified the claim of Phadte/PW5 that the C-form was given at the Police Station by him on 12/12/02. As per Phadte/PW5 the C-form was given by him at Anjuna Police Station on 9/12/02 and to support this story, the prosecution examined Constable Patekar/PW10. Although Patekar/PW10 identified his signature on the carbon copy, earlier produced by Wilson/PW4 and identified by Phadte/PW5, and stated that he had signed the same in token of having received the original, which he had sent to the F.R.O., the Register in this regard maintained by Anjuna Police Station, and earlier produced by Wilson/PW4 on 2/08/04 was not shown to this witness and as such the statement of Phadte/PW5 remained without being corroborated, when it could have been corroborated. That apart the evidence of Phadte/PW5 appears to be conflicting and therefore not convincing. He began by stating that the accused had come to his house on 8/12/02 to make inquiries regarding the room but ended stating that he had not met personally the accused on 8/12/02. He stated in one breath that on 9/12/02 the accused came to his house and he allotted the

middle room to him but in another breath he stated that his mother had given the room to the accused. Phadte/PW5 works as an electrician on the civil side in the Indian Navy at Vasco da Gama and although initially he gave the impression that guest house was his, later he clarified that the business of the guest house was of his mother and the earnings derived from the business were of his mother. It appears that Phadte/PW5 was neither present when room was given to the accused nor at the time of his arrest. His statement that he had submitted C-form on 9/12/02 was an improvement made by him in relation to his statement earlier recorded by police. This fact was also not corroborated by proving the inward register (Exh.39) through Patekar/PW5. The best evidence as regards occupation of the room would have been that of Mrs. Phadte who for best reasons known to the prosecution was not examined by them although she was present at the time of raid, when a fact is required to be proved, the prosecution is expected to prove the same by best evidence available. If the original was handed over on 12/12/02 at Anjuna Police Station one fails to understand as to why Phadte/PW5 made a statement that he had to verify from the records if the original was with him and then come and say, on the next adjourned date, that he was unable to produce it. Prosecution evidence that C-form was submitted by Phadte/PW5 to Anjuna Police Station on 9/12/04 and its carbon copy on 12/12/04 to Wilson/PW4 could not be accepted free from doubt. Related to this aspect is another controversy and that is regarding the key of the room. Ramesh/PW3 and Wilson/PW4 stated that the key of the room was taken by him to be handed over to Phadte/PW5 and that he had inquired at the house of Phadte/PW5 when an aged woman who had identified herself as the mother told

him that she would send her son to Police Station. This woman, as per Dy.S.P. D'Sa/PW6 was about 40-45 years of age. (Phadte/PW5 gave his age as 46 years!). If Mrs. Phadte was present there one does not know as to why the key of the room was not handed over to her. Wilson/PW4 conceded that there was no reference in the chargesheet to the key being handed over to the owner. He then stated that the key was handed over under receipt but in further cross-examination conceded that no receipt was traceable in the file. As per Wilson/PW4, there was a plastic bag hanging on the wall, clothes and other items which were not attached, but according to Phadte/PW5 when he opened the room with the key, he did not find anything inside. This creates a further doubt whether the accused was at all arrested from the middle room of H.No. 19 as claimed by the prosecution, benefit of which should go to the accused.

16. The above discussion shows that there are too many disturbing features in the case of the prosecution so as to accept the same as proved beyond reasonable doubt, against the accused.

17. Consequently, the accused deserves to be given benefit of doubt. As a result, the appeal succeeds. The conviction and sentence imposed by the learned Special Judge, is hereby set aside. The M.O.'s shall be disposed of as per Order dated 21.07.2005 of the learned Special Judge. The accused shall be set to liberty forthwith in case, he is not required in any other case.

Humdast allowed.

N. A. BRITTO, J.

RD-arp/*